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In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

CLINTWOOD ELKHORN MINING COMPANY, GATLIFF COAL COMPANY AND PREMIER ELKHORN COAL COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether a taxpayer who would have been entitled to file a tax-refund action in federal court for a refund of taxes (and interest thereon), but who failed to satisfy a statutory prerequisite to such an action—namely, the filing of a timely administrative refund claim—and is therefore barred from bringing such an action, may nevertheless obtain a refund (and interest thereon) through an action directly under the Constitution pursuant to the Tucker Act, 28 U.S.C. 1491(a).

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BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-6a) is reported at 473 F.3d 1373. The opinion of the Court of Federal Claims (Pet. App. 11a-28a) is reported at 54 Fed. Cl. 563.

JURISDICTION

The judgment of the court of appeals was entered on January 22, 2007. A petition for rehearing was denied on April 27, 2007 (Pet. App. 29a-30a). On July 17, 2007, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including September 9, 2007, and the petition was filed on September 7, 2007. The petition for a writ of certiorari was granted on December 3, 2007. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional and statutory provisions are set forth in an appendix to this brief. App., *infra*, 1a-5a.

STATEMENT

1. a. The Export Clause of the Constitution, Art. I, § 9, Cl. 5, provides that "[n]o Tax or Duty shall be laid on Articles exported from any State." In 2000, the Internal Revenue Service (IRS) acquiesced in a holding by a federal district court that an excise tax on coal (26 U.S.C. 4121(a)) violated the Export Clause, as applied to sales of coal that were in the stream of export and subsequently exported. See Pet. App. 2a. In its acquiescence, the IRS stated that the tax would no longer be imposed on sales of coal that meet those criteria, and that the IRS would refund taxes paid on exported coal if the taxpayer filed a timely administrative claim for refund. See I.R.S. Notice 2000-28, 2000-1 C.B. 1116; Pet. App. 12a.

Section 7422(a) of the Internal Revenue Code provides that "[n]o suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected" unless the taxpayer has "duly filed" with the IRS an administrative claim for a tax refund. 26 U.S.C. 7422(a). Section 6511(a) provides that an administrative "[c]laim for credit or refund of an overpayment of any tax imposed by this [Title 26] * * * shall be filed by the taxpayer within 3 years from the time the return was filed or 2 years from the time the tax was paid," whichever is later. 26 U.S.C. 6511(a). Section 6511(b)(1) further provides that "[n]o credit or refund shall be al-

lowed or made after the expiration of the period of limitation prescribed in subsection (a) for the filing of a claim for credit or refund, unless a claim for credit or refund is filed by the taxpayer within such period." 26 U.S.C. 6511(b)(1). Section 6532(a), in turn, mandates that "[n]o suit or proceeding under section 7422(a) for the recovery of any internal revenue tax * * * shall be begun before the expiration of 6 months from the date of filing the claim required under such section unless the Secretary renders a decision thereon within that time," but any refund suit must be begun within two years after the date of the IRS's disallowance of the refund claim, although that period can be extended by agreement. 26 U.S.C. 6532(a)(1) and (2). A refund suit may be brought either in a federal district court or in the Court of Federal Claims. 28 U.S.C. 1346(a)(1).

In addition, 28 U.S.C. 2411 provides in pertinent part that, "[i]n any judgment of any court rendered * * * for any overpayment in respect of any internal-revenue tax, interest shall be allowed at the overpayment rate established under section 6621 of the Internal Revenue Code of 1986 upon the amount of the overpayment." It further establishes that interest shall run "from the date of the payment or collection thereof to a date preceding the date of the refund check by not more than thirty days, such date to be determined by the Commissioner of Internal Revenue." *Ibid.*

b. In *Cyprus Amax Coal Co.* v. *United States*, 205 F.3d 1369 (2000), cert. denied, 532 U.S. 1065 (2001), the Federal Circuit held that a taxpayer may bring a suit against the United States for money damages directly under the Export Clause, as an "alternative avenue[]" to "a tax refund action"; that such a suit may proceed in the Court of Federal Claims under the Tucker Act, 28

U.S.C. 1491(a); and that such an "alternative" action is "not subject to compliance with the tax refund statute." *Cyprus Amax*, 205 F.3d at 1373-1376. The court reasoned that the "necessary implication of the Export Clause[']s unqualified proscription is that the remedy for its violation entails a return of money unlawfully exacted." *Id.* at 1373, 1375. Accordingly, the court held that the Export Clause is "self-executing; that is, * * * a party can recover for payment of taxes under the Export Clause independent of the tax refund statute." *Id.* at 1374. The court further concluded that such a suit was subject to the general six-year limitation period of 28 U.S.C. 2501 for suits under the Tucker Act, rather than the shorter statute of limitations prescribed by 26 U.S.C. 6511(a) for filing a timely administrative "[c]laim for * * * refund of an overpayment of any tax" as a prerequisite to suit. *Cyprus Amax*, 205 F.3d at 1372-1373.

2. Respondents, three coal companies, filed timely administrative claims for refund of coal excise tax they had paid on exported coal during 1997, 1998, and 1999.[1] The IRS refunded those taxes, including interest. Respondents failed, however, to file timely administrative refund claims for $1,065,936 in coal excise tax paid on exported coal in 1994, 1995, and 1996. See Pet. App. 3a-4a, 9a; Resp. C.A. Br. 5. Consequently, the IRS did not refund those taxes. Respondents then filed this suit in the Court of Federal Claims seeking "damages consisting of a refund" of the coal excise tax not already refunded, and "appropriate interest, costs, and attorney's fees." Pet. App. 37a-38a.

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[1] Returns and payments of coal excise taxes are made on a quarterly basis. 26 C.F.R. 40.0-1(a), 40.6011(a)-1.

The Court of Federal Claims, relying on the Federal Circuit's earlier decision in *Cyprus Amax*, allowed respondents to pursue their monetary claims directly under the Export Clause and to avail themselves of the general six-year statute of limitations in the Tucker Act, 28 U.S.C. 2501, notwithstanding their failure to file timely administrative refund claims. Pet. App. 14a. The court, however, denied respondents' request for interest on their claims. *Id.* at 14a-28a. It concluded that respondents could not recover interest under 28 U.S.C. 2411 because, under the reasoning of *Cyprus Amax*, their claims were "for damage under the Export Clause rather than * * * tax refunds pursuant to the Tax Code." Pet. App. 17a. The court rejected respondents' argument that they could "avoid the shorter statute of limitations, and the administrative requirements of the tax refund statutes by using the Export Clause for jurisdiction, while returning to the tax statutes to obtain interest pursuant to § 2411." *Ibid.*[2]

In a subsequent order, the court denied the government's request to dismiss respondents' claims with respect to tax periods as to which respondents failed to file timely administrative refund claims or, in the alternative, to limit respondents' recovery to those claims falling within the three-year limitation period of Section 6511(a). Pet. App. 10a; see *id.* at 41a-42a. The court entered judgment for respondents in the stipulated amount of $1,065,936, without interest. *Id.* at 7a.

3. On cross-appeals, the court of appeals affirmed in part and reversed in part. Pet. App. 1a-6a. Rejecting

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[2] The court also rejected respondents' arguments that the Export Clause and other constitutional provisions mandated the payment of interest. Pet. App. 19a-27a. Respondents abandoned those arguments on appeal.

the government's request for an initial hearing en banc, the court expressly declined to reconsider its decision in *Cyprus Amax*, *id.* at 2a-3a, holding that respondents "could either proceed in court under the Tucker Act, or seek an administrative tax refund under the Tax Code." *Id.* at 3a. The court asserted that "[a] consequence of Tucker Act jurisdiction is that the statute of limitations is six years, 28 U.S.C. § 2501, whereas refund claims brought administratively to the Internal Revenue Service are limited to recovery of overpayments for the preceding three years." Pet. App. 3a (citing 26 U.S.C. 6511(a)). The court therefore held that respondents could seek recovery of the coal excise tax paid in 1994 through 1996, under the longer six-year statute of limitations, even though they had not filed administrative claims for those amounts. *Ibid.*

The court of appeals further held that Section 2411 entitled respondents to recover interest on the coal excise tax paid on exported coal for 1994 through 1996, notwithstanding their failure to file timely administrative claims for those years. Pet. App. 1a, 3a-6a.[3] The court reasoned that Section 2411 "is a straightforward recognition that the government should pay for its use of a taxpayer's money to which the government was not entitled." *Id.* at 5a. And the court concluded that, whether or not respondents had filed an administrative claim, the judgment awarded to them was "for" an "overpayment" of tax within the meaning of Section 2411, and that respondents therefore were entitled to interest "on the refunded export taxes for the entire period of recovery." *Id.* at 6a.

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[3] The court noted that the government did not dispute entitlement to interest for the years 1997 through 1999 "because an administrative claim was filed for those years." Pet. App. 4a.

The government filed a petition for rehearing en banc, which the court denied without noted dissent. Pet. App. 29a-30a.

SUMMARY OF ARGUMENT

Congress created a comprehensive and finely reticulated statutory regime for resolving claims by taxpayers seeking to recover alleged tax overpayments. That all-encompassing tax remedial scheme includes a mandatory administrative claims process, explicit preclusion of judicial relief in the absence of compliance with that administrative process, and uniquely tailored limitation periods both for the administrative remedy and for any subsequent judicial proceedings. Notwithstanding the utter clarity and unmistakable forcefulness with which Congress mandated that "[*n*]o suit or proceeding" for "the recovery of *any* internal revenue tax" shall "be maintained in *any* court" absent compliance with those procedures, 26 U.S.C. 7422(a) (emphases added), the Federal Circuit fashioned an "alternative" judicial remedy with a longer limitation period and without an administrative exhaustion requirement, in patent disregard of the congressional mandate. That error should be corrected, and the judgment of the court of appeals should be reversed.

As expanded by the decision below, the Federal Circuit's "alternative" refund remedy is predicated on three propositions, each of which is essential to the judgment below, and each of which is incorrect. First, the court of appeals erroneously reasoned that the statutory tax-refund mechanism created by Congress does not govern tax challenges pleaded solely under the Tucker Act and the Constitution. Second, the court incorrectly held that the Export Clause provides for a freestanding and self-

executing claim against the United States. And third, the court wrongly concluded that respondents could recover interest under a statute that applies only to claims for an overpayment of taxes, even while proceeding under an "alternative" cause of action that is purportedly separate and distinct from a tax-refund claim. None of those holdings is correct.

1. The court of appeals erred in allowing respondents to maintain their suit for recovery of taxes under the Export Clause without having filed a timely administrative claim for refund. The Internal Revenue Code plainly states that "[n]o suit or proceeding" to recover "any" tax "alleged to have been erroneously or illegally assessed or collected" may be brought "in any court" unless the taxpayer first files a timely refund claim and allows the Secretary of the Treasury a specified time to resolve it. 26 U.S.C. 7422(a); see 26 U.S.C. 6511(a) and (b)(1), 6532(a). That detailed and finely reticulated tax-refund scheme, including the mandatory administrative claims process and the firm, non-tollable limitation period, cannot be circumvented by the expedient of pleading a constitutional claim and asserting jurisdiction under the Tucker Act. Claims for repayment of unlawful tax are subject to the exclusive procedural requirements set out in the tax code, no matter what the source of the alleged illegality—be it regulatory, statutory, or constitutional.

The Federal Circuit's "alternative" remedy is foreclosed by this Court's decision in *United States* v. *A.S. Kreider Co.*, 313 U.S. 443 (1941), which rejected a court of appeals' holding that a tax-refund suit brought under the Tucker Act was subject only to the general six-year statute of limitations applicable to Tucker Act claims rather than the specific five-year statute that then gov-

erned tax-refund suits. Here, the court of appeals committed the same error, applying the Tucker Act's general six-year statute of limitations rather than the shorter statute of limitations and other expressly exclusive procedures specifically applicable to tax-refund suits.

This Court's decision in *United States* v. *New York & Cuba Mail Steamship Co.*, 200 U.S. 488 (1906), is similarly irreconcilable with the rule of law applied below. In that case, the Court held that an action under the Tucker Act to recover overpayments of a stamp tax that concededly violated the Export Clause had to be dismissed because the taxpayer had failed to make an administrative protest before paying the tax—a protest that, at the time, was a prerequisite to bringing a suit for the recovery of an unlawful tax.

Although the expressly exclusive nature of the tax-refund remedy makes this a particularly straightforward case, the court of appeals' resort to the "alternative" procedures of the Tucker Act cannot be reconciled with cases holding that, even in the absence of such explicit language of exclusivity, a precisely drawn, detailed statute precludes an attempt to resort to more general remedies. See, *e.g.*, *Hinck* v. *United States*, 127 S. Ct. 2011 (2007); *EC Term of Years Trust* v. *United States*, 127 S. Ct. 1763 (2007). In both *EC Term of Years* and *Hinck*, the Court rejected attempts by taxpayers to use the Tucker Act's grant of jurisdiction as a basis for evading the limitations imposed by Congress on a specific and directly applicable remedial scheme. In this case, by contrast, the court of appeals erroneously authorized just such an evasion.

2. The clarity of the expressly exclusive language in the tax-refund scheme, and its reinforcement by recent

cases that (even in the *absence* of explicitly exclusive statutory language) precluded resort to a more general Tucker Act remedy, makes the court of appeals' decision difficult to understand. The court appears to have been influenced by the constitutional nature of the claims, but the fact that the taxes collected were unconstitutional under the Export Clause does not justify the creation of a freestanding constitutional remedy or the application of the Tucker Act's more lenient procedural limitations. Nothing in the text of the Export Clause supports the creation of a "self-executing" cause of action, let alone a remedy that can supplant the adequate but limited tax-refund remedy through which Congress has implemented the constitutional guarantee.

Causes of action are not so easily inferred under the Constitution, as this Court has repeatedly warned. Since the decision in *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), this Court has sustained a new damages remedy under the Constitution only twice. It has never inferred such a damages remedy directly against the United States, like the one created by the court of appeals, nor has it ever created a new constitutional cause of action when Congress has already set out an adequate statutory form of redress, as Congress has done here by creating the tax-refund procedure. The court of appeals' recognition of a freestanding and self-executing Export Clause cause of action completely disregards those limitations, and should be rejected.

3. The court of appeals erred not only by allowing respondents to evade the tax-refund remedy's mandatory administrative claims process and shorter statute of limitations, but by turning around and allowing respondents to benefit from one aspect of that remedy that

favors taxpayers—the allowance of interest. The interest provision, 28 U.S.C. 2411, is an integral part of the refund procedure and applies only to judgments "for any overpayment in respect of any internal-revenue tax." The entire tax-refund process—including the refund-claim requirement, the statute of limitations, and the right to recover interest—is a "package deal" constructed by Congress, and the entire process must therefore remain intact. *Hinck*, 127 S. Ct. at 2016. Properly understood, respondents' claims are for recovery of an allegedly overpaid tax; the government therefore correctly paid respondents interest on their timely and valid refund claims, and correctly denied all relief (including interest) that was not requested in a timely refund claim. If, however, as the Federal Circuit reasoned, respondents are *not* asserting tax-refund claims, but instead are pursuing wholly separate and distinct claims for "damages" under the Export Clause, it would necessarily follow that they cannot qualify for an award of interest. Settled principles of sovereign immunity establish that plaintiffs cannot recover interest from the United States without a specific statutory authorization. Respondents cannot claim such authorization from Section 2411, which is expressly limited to claims for tax overpayments, and simultaneously deny that they are pursuing claims for tax overpayments.

ARGUMENT

THE FEDERAL CIRCUIT ERRED IN ALLOWING RESPONDENTS TO CIRCUMVENT THE DETAILED, CAREFULLY CRAFTED STATUTORY SCHEME THAT GOVERNS SUITS FOR THE REFUND OF TAX

The basic statutory question here is straightforward. The tax-refund scheme is expressly exclusive. And even in the absence of such express language, this Court has found targeted and precisely limited remedial schemes to preclude resort to the general provisions of the Tucker Act. Nonetheless, the court of appeals authorized an alternative remedy because the illegality of the taxes that respondents paid stems from the Export Clause. But the constitutional nature of the underlying illegality does not change the statutory analysis. The tax-refund scheme provides the exclusive avenue for recovery of taxes unlawfully collected or assessed—without regard to whether the illegality flows from a regulation, a statute, or the Constitution.

In the absence of any statutory mechanism for recovering taxes assessed in violation of the Export Clause, the courts might have considered permitting an implied remedy, such as the common-law assumpsit action against the tax collector that did service for taxpayers before Congress provided a statutory remedy. See, *e.g.*, *Elliott* v. *Swartwout*, 35 U.S. (10 Pet.) 137, 150, 156-158 (1836). However, in light of the statutory mechanism for recovering unlawful tax payments—subject to reasonable exhaustion requirements and reasonable limitation periods—there is absolutely no basis for inferring any kind of self-executing constitutional remedy. And there is no more basis for altering the normal rules that determine how exclusive statutory recovery mechanisms in-

terrelate with the Tucker Act. Application of those principles admits of but one answer: the tax-refund scheme is exclusive, and the decision below must be reversed.

A. The Unambiguous Text Of The Internal Revenue Code Precludes Respondents' Untimely Claims For Recovery Of Tax Overpayments

1. Congress created a comprehensive and finely reticulated statutory regime for resolving claims by taxpayers for the recovery of alleged tax overpayments. Under that comprehensive and expressly exclusive tax-refund scheme, an administrative claim for a refund "of *any* tax imposed by * * * [Title 26]" (including the tax at issue here, 26 U.S.C. 4121(a)) "*shall* be filed by the taxpayer within 3 years from the time the return was filed or 2 years from the time the tax was paid," whichever is later. 26 U.S.C. 6511(a) (emphases added). The statute further provides that "[*n*]*o* * * * *refund shall be allowed* * * * unless a claim for * * * refund is filed by the taxpayer within such period." 26 U.S.C. 6511(b) (emphasis added). This Court has noted the "unusually emphatic form" and "highly detailed technical manner" in which Section 6511 "sets forth its time limitations." *United States* v. *Brockamp*, 519 U.S. 347, 350 (1997) (refusing to apply equitable tolling to those limitations); accord *John R. Sand & Gravel Co.* v. *United States*, No. 06-1164 (Jan. 8, 2008), slip op. 2-3 (noting that limitations provisions like Section 6511 serve "broader system-related goal[s]," including "facilitating the administration of claims").

In equally emphatic and explicit terms, Section 7422(a) mandates that "[*n*]*o suit* or proceeding shall be maintained in *any court* for the recovery of *any internal revenue tax* alleged to have been erroneously or illegally

assessed or collected * * * until a claim for refund or credit has been duly filed with" the IRS. 26 U.S.C. 7422(a) (emphases added). Once the requisite administrative claim has been filed, "[n]o suit or proceeding" for refund of the tax may be instituted until the claim has been disallowed, or for six months if the claim is not resolved during that time. 26 U.S.C. 6532(a)(1).

Congress thus spoke with absolute clarity and forcefulness in mandating that the comprehensive tax-refund scheme provide the exclusive mechanism by which taxpayers could recover taxes wrongfully collected by the government. Against that backdrop, the Federal Circuit's creation of an "alternative" judicial remedy—a remedy that offers a longer limitation period than the three years specified by Congress for tax-refund claims, and that evades entirely the administrative claims process mandated by Congress "for the recovery of any internal revenue tax"—simply cannot be justified.

2. The court of appeals permitted respondents to recover erroneously collected coal excise taxes (and associated interest) through an action for "money damages" directly under the Export Clause, characterizing that "damages" action as an "alternative avenue[]" to "a tax refund action" that is "not subject to compliance with the tax refund statute." *Cyprus Amax Coal Co.* v. *United States*, 205 F.3d 1369, 1373, 1375-1376 (Fed. Cir. 2000), cert. denied, 532 U.S. 1065 (2001); see Pet. App. 2a-3a. The court never explained why such a constitutional claim would not fall within the clear, specific, and comprehensive terms of Section 7422(a); that provision covers "any" court and "any" allegedly unlawful tax without regard to the source of the illegality. Instead, the court of appeals simply asserted that *because* the Export Clause purportedly creates a self-executing

cause of action, such claims need not comply with the procedural statutes that otherwise would bar respondents' claims here, and instead are subject to the Tucker Act's general six-year statute of limitations. If the Export Clause claims were truly self-executing to such a degree that they could not be limited by Congress—which they are not, see pp. 29-40, *infra*—there is no reason to think they would be any more constrained by the Tucker Act than by the tax-refund scheme. But, in all events, the specific tax-refund scheme generally governs over the more general Tucker Act provisions, and the constitutional nature of the alleged illegality does not justify a different rule.

a. As discussed, "[*n*]*o* suit" for the recovery of "*any* internal revenue tax alleged to have been erroneously or illegally assessed or collected" may be maintained in "*any*" court unless the Internal Revenue Code's administrative-claim requirements are satisfied. 26 U.S.C. 7422(a) (emphases added). The prayer for relief in respondents' complaint demonstrates that their suit is inherently and necessarily an action to recover illegally collected taxes, not a suit for general damages. Pet. App. 37a-38a (seeking "an award of damages consisting of a refund"). Indeed, the court of appeals accurately characterized respondents' relief as a "repayment" or "recovery of * * * taxes." *Id.* at 1a; accord *id.* at 2a. And Section 7422(a) governs all refund claims for taxes alleged to have been illegally assessed or collected, without regard to the source of the alleged illegality. Cf. *Alexander* v. *"Americans United" Inc.*, 416 U.S. 752, 759 (1974) (observing that decisions of the Court make "unmistakably clear that the constitutional nature of a taxpayer's claim * * * is of no consequence" for purposes of applying the Anti-Injunction Act, 26 U.S.C.

7421, which bars suits to enjoin assessment or collection of a tax). Section 7422(a) establishes a procedural prerequisite to federal court jurisdiction over "any" cause of action in "any" court for the refund of "any" internal revenue tax, and is therefore fully applicable to claims for recovery of taxes on constitutional grounds. As respondents' successful refund claims for coal excise tax paid in 1997 through 1999 demonstrate, Pet. App. 4a, respondents could have asserted their Export Clause claims through the specific remedial scheme for tax refunds, if they had timely complied with the requirements of that statutory scheme. See *Cyprus Amax*, 205 F.3d at 1372 (recognizing that a taxpayer who "complied with the tax refund statute and filed a tax refund action * * * can pursue the theories underlying its constitutionally-based causes of action through its tax refund action"); see also, *e.g.*, *United States* v. *IBM Corp.*, 517 U.S. 843, 845-846 (1996) (Export Clause challenge in which the taxpayer properly sought a refund before bringing suit).

This Court has already rejected an effort to use the Tucker Act to avoid specific requirements for pursuing tax-refund claims based on the Export Clause. In *United States* v. *New York & Cuba Mail Steamship Co.*, 200 U.S. 488 (1906), this Court rejected a taxpayer's attempt to litigate an Export Clause claim under the Tucker Act without complying with the procedural prerequisites applicable to tax-refund actions. The taxpayer sought to recover amounts paid for tax stamps on exports, and the government conceded that the stamp tax violated the Export Clause. *Id.* at 490-491. Under the then-applicable procedures, however, protest or notice to the collector at the time of payment was generally necessary if the taxpayer wished to preserve its ability to challenge

an allegedly invalid tax under the tax-refund statutes. See *Chesebrough* v. *United States*, 192 U.S. 253, 259-264 (1904). The taxpayer in *New York & Cuba Mail* had failed to comply with the protest requirement, and accordingly the government argued that its claim was barred. 200 U.S. at 491, 492, 494. In response, the taxpayer sought to invoke an alternative avenue of relief for effectuation of its Export Clause claims under the Tucker Act, pointing to a separate statute authorizing the redemption of tax stamps reflecting amounts that had been "in any manner wrongfully collected." *Id.* at 494-495 (quoting Act of May 12, 1900, ch. 393, § 1, 31 Stat. 178). Notwithstanding that separate statutory avenue for relief, and without regard to the constitutional nature of the taxpayer's claims, the Court held that the normal procedural prerequisites still governed, and accordingly denied relief. 200 U.S. at 495. The same result is required here.[4]

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[4] The Federal Circuit attempted to distinguish *New York & Cuba Mail* on the ground that the taxpayer there proceeded under a tax-refund statute, rather than under the Export Clause directly. *Cyprus Amax*, 205 F.3d at 1375-1376. As the Court's opinion in *New York & Cuba Mail* reflects, however, the taxpayer's claim there was founded both on the Export Clause and on a revenue statute allowing refunds, and the taxpayer argued that it had "a right of action under the Tucker Act." 200 U.S. at 494. If the Federal Circuit's decisions here and in *Cyprus Amax* were correct, the taxpayer in *New York & Cuba Mail* likewise should have been entitled to evade the payment-under-protest requirement. Moreover, the presence of an alternative mechanism to vindicate Export Clause rights is a sufficient reason to reject an effort to infer a cause of action directly from the Export Clause. Pointing to the Export Clause action not only fails to distinguish *New York & Cuba Mail*, but underscores that the constitutional claim seems to have distracted the court of appeals from a statutory question that should have been quite straightforward.

b. The Federal Circuit similarly erred in holding that the Tucker Act's six-year statute of limitations would govern respondents' supposed freestanding claim under the Export Clause. *Cyprus Amax*, 205 F.3d at 1372 (stating that "a different statute of limitations [28 U.S.C. 2501] pertains to the Tucker Act than to the tax refund statutes"); see Pet. App. 2a-3a. As this Court has squarely held, the Tucker Act's general six-year limitation period establishes only "an outside limit on the period within which all suits might be initiated" against the United States. *United States* v. *A.S. Kreider Co.*, 313 U.S. 443, 447 (1941).

The *A.S. Kreider* Court squarely rejected a similar attempt by a taxpayer to avoid the then-applicable statute of limitations specific to tax-refund actions. See 313 U.S. at 446. In that case, the taxpayer had failed (like respondents here) to file a tax-refund action within the tax-specific limitation period. *Id.* at 445 (citing Revenue Act of 1926, ch. 27, § 1113(a), 44 Stat. 116). The taxpayer sought (again like respondents) to rely upon the longer, six-year statute of limitations in the Tucker Act, which applied generally to "suit[s] against the Government," including but not limited to suits "for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected." 28 U.S.C. 41(20) (1940).

The Court rejected the taxpayer's attempted end run, reasoning that the shorter and more specific limitation period for tax-refund actions would have "no meaning" if it could be evaded through reliance on the general Tucker Act limitation period. *A.S. Kreider*, 313 U.S. at 448. Observing that the six-year period was phrased merely as an "outside limit" (*i.e.*, as a requirement that "[n]o suit against * * * the United States shall be al-

lowed * * * unless * * * brought within six years" of accrual), the Court held that "nothing in that language precludes the application of a different and shorter period of limitation to an individual class of actions." *Id.* at 447 (quoting 28 U.S.C. 41(20) (1940)). In so holding, the Court noted the strong federal policy behind the shorter limitation period: Congress "[r]ecogniz[ed] that suits against the United States for the recovery of taxes impeded effective administration of the revenue laws." *Ibid.*

The current version of the six-year limitation period is likewise phrased as an "outside limit," mandating that "[e]very claim * * * shall be barred unless * * * filed within six years." 28 U.S.C. 2501. *A.S. Kreider* therefore forecloses the court of appeals' holding that respondents are subject only to the general six-year limitation period and not the shorter and more specific regime applicable to tax-refund claims.

Indeed, were the rule otherwise, *every* tax-refund claim brought in the Court of Federal Claims could potentially invoke the more generous six-year statute of limitations. Section 2501 currently applies to "[e]very claim of which the United States Court of Federal Claims has jurisdiction," a category that includes tax-refund claims founded solely on the Internal Revenue Code rather than on the Constitution. It is undisputed, however, that in such cases the taxpayer may not rely on the six-year "outside limit" for Tucker Act claims generally, but is instead subject to the more specific and less generous provisions of 26 U.S.C. 6511(a), 6532(a)(1), and 7422(a). Nothing in the Tucker Act statute of limitations distinguishes constitutional from statutory claims or otherwise provides any support for the Federal Circuit's refusal to apply the "emphatic" and "highly detailed

technical" limitation periods established by Congress for the recovery of taxes. *Brockamp*, 519 U.S. at 350.

B. The Express Textual Exclusivity Of The Tax-Refund Scheme Is Reinforced By The Principle That A Precisely Drawn, Detailed Remedy Precludes Resort To A More General Remedy

1. Even if the plain text of the Internal Revenue Code did not expressly bar the Federal Circuit's "alternative" remedy, fundamental principles of statutory construction would compel the same result. This Court has frequently held, even in the absence of language as emphatic as in Section 7422(a), that where Congress has enacted a comprehensive statutory scheme that provides an orderly and adequate means by which all challenges to an asserted liability may be adjudicated, that statutory scheme is exclusive. *E.g.*, *Brown v. GSA*, 425 U.S. 820, 834 (1976); *United States* v. *Jefferson Elec. Mfg. Co.*, 291 U.S. 386, 395 (1934); *Snyder* v. *Marks*, 109 U.S. 189, 193 (1883). Indeed, as recently as last Term, the Court twice reaffirmed and reinforced that principle in the tax context.

In *EC Term of Years Trust* v. *United States*, 127 S. Ct. 1763 (2007), for example, the Court held that a party could not evade the specific restrictions, including a shorter limitation period, of a tax remedial scheme that was "better-fitted" to its claims by resorting to the more generous terms of the Tucker Act, 28 U.S.C. 1346(a)(1). In that case, a trust sought to challenge a government levy on its property that was designed to collect the taxes owed by a taxpayer other than the trust. *EC Term of Years*, 127 S. Ct. at 1766. Having failed to bring a timely action under 26 U.S.C. 7426—which provides for wrongful-levy actions by third parties

in the trust's situation—the trust instead brought a tax-refund suit in federal district court, relying on the Tucker Act's general tax-refund jurisdiction, 28 U.S.C. 1346(a)(1), and the relatively longer limitation period for tax-refund suits. *EC Term of Years*, 127 S. Ct. at 1766-1767 & n.2.

The Court rejected that attempt, holding that "a precisely drawn, detailed statute pre-empts more general remedies," and that the preemption principle is further "brace[d] * * * when resort to a general remedy would effectively extend the limitations period for the specific one." *EC Term of Years*, 127 S. Ct. at 1767 (quoting *Brown*, 425 U.S. at 834). The Court reasoned that "if third parties could avail themselves of the general tax refund jurisdiction of § 1346(a)(1), they could effortlessly evade the levy statute's 9-month limitations period." *Ibid.*

Similarly, the Court held in *Hinck* v. *United States*, 127 S. Ct. 2011, 2014-2018 (2007), that 26 U.S.C. 6404(h) (Supp. IV 2004), which permits a taxpayer to challenge in the Tax Court the IRS's refusal to abate interest on unpaid tax liabilities, provides the exclusive means by which a taxpayer can bring such a challenge. In so holding, the Court rejected the taxpayers' argument that they could also seek review of abatement-of-interest determinations "under statutes granting jurisdiction to the district courts and the Court of Federal Claims to review tax refund actions." *Id.* at 2016 (citing 28 U.S.C. 1346(a)(1), 1491(a)(1); 26 U.S.C. 7422(a)). Rather, the Court concluded, the "precisely drawn, detailed statute" of Section 6404(h), including its specification of the Tax Court as "the forum for adjudication," preempted resort to the more general jurisdictional provisions of the Tucker Act. *Id.* at 2015. In so holding, the Court rejec-

ted the taxpayers' attempt to rely on one portion of the remedy afforded by Section 6404(h), namely "the portion specifying a standard of review," while "circumvent[ing] the other limiting features Congress placed in the *same* statute—restrictions such as a shorter statute of limitations than general refund suits * * * or a net-worth ceiling for plaintiffs eligible to bring suit." *Id.* at 2016.

2. a. The reasoning of *EC Term of Years* and *Hinck* applies *a fortiori* here, and is irreconcilable with the decision below. Congress has established a careful and thorough remedial scheme to resolve the very type of claim asserted by respondents: the tax-refund mechanism, which comprehensively provides for the refund of any internal revenue taxes that were illegally or erroneously assessed or collected. See Pet. App. 37a-38a (complaint seeking "damages consisting of a refund"). That comprehensive scheme expressly preempts resort to more general remedies, particularly those that are subject to a more generous statute of limitations, and it precludes respondents from relying on one portion of that comprehensive scheme (*i.e.*, the allowance of interest) while evading others.

As discussed, the congressionally crafted remedial scheme for recovery of tax overpayments establishes a mandatory administrative claims process that is subject to a three-year limitation period, and provides for judicial relief only after compliance with that administrative process (subject to a separate statute of limitations). 26 U.S.C. 6511(a) and (b)(1), 6532(a)(1), 7422(a). In addition, Congress has granted concurrent jurisdiction to the Court of Federal Claims and the federal district courts to hear tax-refund claims. 28 U.S.C. 1346(a)(1),

1491(a).[5] Congress has further provided that "interest shall be allowed," in the event of "any judgment of any court rendered * * * for any overpayment in respect of any internal-revenue tax," at a rate established by 26 U.S.C. 6621 "from the date of the payment or collection thereof to a date preceding the date of the refund check by not more than thirty days." 28 U.S.C. 2411.

Those provisions are all components of a carefully integrated remedial scheme. See *Flora* v. *United States*, 362 U.S. 145, 157 (1960) (describing the "carefully articulated and quite complicated structure" of the statutes requiring submission of a refund claim and, in some circumstances, prepayment of tax). Accordingly, while Congress conferred jurisdiction to hear tax-refund claims in "spacious terms," this Court has made clear that those jurisdictional grants "must be read in conformity with other statutory provisions which qualify a taxpayer's right to bring a refund suit upon compliance with certain conditions." *United States* v. *Dalm*, 494 U.S. 596, 601-602 (1990) (holding that the restrictions in Section 7422(a) and Section 6511(a) applied to a taxpayer's invocation of Section 1346(a)(1)'s jurisdictional grant); see, *e.g.*, *Commissioner* v. *Lundy*, 516 U.S. 235, 240 (1996) (noting in dicta that "timely filing of a refund claim" pursuant to 26 U.S.C. 7422(a) is "a jurisdictional

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[5] Section 1346(a)(1) grants district courts original jurisdiction over "[a]ny civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected." Section 1491(a) provides the Court of Federal Claims with jurisdiction over "any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department." See generally *Flora* v. *United States*, 362 U.S. 145, 151-152 (1960) (discussing historical development of Tucker Act jurisdiction in tax context).

prerequisite" to bringing a refund suit in either the Court of Federal Claims or a federal district court); *United States* v. *Felt & Tarrant Mfg. Co.*, 283 U.S. 269, 272-273 (1931) (holding that failure to file an administrative refund claim barred a tax-refund suit in the Court of Claims); *Baltimore & Ohio R.R.* v. *United States*, 260 U.S. 565 (1923) (same); *New York & Cuba Mail*, 200 U.S. at 491-495.

The comprehensive remedial scheme for tax-refund claims allows taxpayers an opportunity to challenge taxes that they contend have been erroneously or illegally collected, while ensuring the orderly administration and adjudication of such claims. Section 7422(a)'s claim-filing requirements serve both (1) to give the IRS notice of the nature of the claim and the specific facts upon which it is predicated, thereby permitting an administrative investigation and determination; and (2) to provide the IRS with an opportunity to correct any conceded errors, and if disagreement remains, to limit the scope of any ensuing litigation to those issues that the IRS has examined and is willing to defend. See, *e.g.*, *Felt & Tarrant*, 283 U.S. at 272. The prescribed time limits, see 26 U.S.C. 6511(a), 6532(a)(1), also ensure that claims are made promptly, and that the IRS has adequate time to review a claim before a suit is filed. Compare 26 U.S.C. 6532(a)(1) (allowing the IRS six months to review an administrative refund claim before suit may be filed), with Fed. R. Civ. P. 12(a)(3)(A) (allowing the United States 60 days to answer a judicial complaint), and Fed. Cl. R. 12(a)(1) (same).

b. Accordingly, as with the specific statutory tax remedies at issue in *EC Term of Years* and *Hinck*, Congress has enacted "a precisely drawn, detailed" statutory scheme specifically tailored to address respondents'

claims for a refund. The detailed and reticulated tax-refund scheme is comprehensive: it designates the fora for adjudication, requires an administrative claim, establishes intricate and inter-related limitation periods, and authorizes judicial relief, including interest. See *EC Term of Years*, 127 S. Ct. at 1766, 1767-1768; *Hinck*, 127 S. Ct. at 2015. And, as in *EC Term of Years* and *Hinck*, the statutory restrictions serve the purpose of ensuring the fair and efficient administration of the tax system—a purpose that would be frustrated by allowing resort to a more general remedy. *Hinck*, 127 S. Ct. at 2016-2017; *EC Term of Years*, 127 S. Ct. at 1766, 1767-1768. The inescapable conclusion mandated by those precedents is that the specific tax-refund remedy is exclusive and preempts respondents' attempt to rely on the Tucker Act's general jurisdictional grant while evading all of the specific limitations established by Congress in the tax context. *Ibid.*[6]

Indeed, it is difficult to see how the decisions in *Hinck* and *EC Term of Years* could be more on point. In both cases, the plaintiffs sought to resort to the relatively more generous terms of the Tucker Act. *Hinck*,

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[6] To be sure, in *EC Term of Years* and *Hinck*, the general remedy to which resort was precluded was the tax-refund remedy, whereas here the tax-refund remedy is the specific remedy that would preclude respondents' resort to another remedy. As the Court's cases make clear, however, the important point is that the tax-refund remedy is the "better-fitted" of the remedies, *EC Term of Years*, 127 S. Ct. at 1767, and the one that Congress specifically tailored for claims like those at issue here. The statute dealing with tax claims may be less specific than one dealing with tax *levy* claims, as in *EC Term of Years*, but it certainly is more specific (and "better fitted" here) than the general jurisdictional grant embodied in the Tucker Act, standing alone, which deals with a wide array of claims against the government, including but not limited to tax claims.

127 S. Ct. at 2016; *EC Term of Years*, 127 S. Ct. at 1767. And, in both cases, the Court rejected those attempts based on the governing legal principle that the Federal Circuit failed to apply here: When Congress has created a comprehensive remedial scheme addressed to the plaintiff's situation, the plaintiff cannot circumvent the restrictions on that remedy by resorting to general (and more generous) remedial provisions.

Here, the court of appeals sanctioned precisely the sort of circumvention condemned by this Court in *EC Term of Years* and *Hinck*. It allowed respondents to pursue their monetary claims for a tax "refund" (Pet. App. 37a-38a)—including interest on their "overpayment" of tax—under the general provisions of the Tucker Act, without regard to the comprehensive, and carefully reticulated, remedial provisions for tax-refund claims. See *id.* at 2a-6a. The court of appeals thereby allowed respondents to evade the Internal Revenue Code's mandatory and expressly applicable administrative-claim requirement. 26 U.S.C. 7422(a); see pp. 13-19, *supra*. The court also permitted respondents to circumvent the relatively shorter, and more detailed, time limitations set forth for administrative-refund claims and subsequent judicial proceedings. See 26 U.S.C. 6511(a) and (b), 6532(a)(1) and (2). Like the trust in *EC Term of Years*, respondents should not be allowed to re-label their claims and thereby "effortlessly evade" the restrictions that Congress placed on the remedy specifically tailored for those claims. 127 S. Ct. at 1767-1768. As this Court has aptly observed, "[i]t would require the suspension of disbelief to ascribe to Congress the design to allow its careful and thorough remedial scheme to be circumvented by artful pleading." *Brown*, 425 U.S. at 833.

3. If there were any doubt about whether respondents were required to comply with the procedural requirements applicable to tax-refund cases, that doubt would have to be resolved in favor of the government. It is axiomatic that the United States cannot be sued unless Congress has waived the government's sovereign immunity. See U.S. Const. Art. I, § 9, Cl. 7 (Appropriations Clause). Waivers of that immunity, and terms and conditions that Congress attaches to those waivers, are strictly construed. See, *e.g.*, *United States* v. *Nordic Vill., Inc.*, 503 U.S. 30, 33, 34, 37 (1992); *Dalm*, 494 U.S. at 608; *Block* v. *North Dakota ex rel. Bd. of Univ. & Sch. Lands*, 461 U.S. 273, 287 (1983). "A statute of limitations requiring that a suit against the Government be brought within a certain time period is one of those terms" requiring strict construction. *Dalm*, 494 U.S. at 608; see *Block*, 461 U.S. at 287; *Finn* v. *United States*, 123 U.S. 227, 232 (1887); see also *John R. Sand & Gravel Co.*, *supra*, slip op. 3.

Thus, when a party fails to commence a suit against the United States within the limitation period, the government has not waived its sovereign immunity, and courts lack authority to entertain the suit. *E.g.*, *Dalm*, 494 U.S. at 608-610. And even when Congress has provided one statute of limitations for a general class of actions, it nevertheless can "provide less liberally for particular actions which, because of special considerations, require[] different treatment." *A.S. Kreider*, 313 U.S. at 447. Congress has done precisely that with respect to tax-refund suits. *Ibid.*; see 26 U.S.C. 6511(a), 6532(a)(1). To allow taxpayers like respondents to avoid the restrictions on Congress's waiver of the United States' sovereign immunity for tax-refund claims by seeking a refund directly under the Export Clause (or

some other constitutional provision[7]) would improperly permit Congress's "careful and thorough remedial scheme to be circumvented by artful pleading." *Brown*, 425 U.S. at 833.

Congress unquestionably has the authority to specify the conditions (including procedural limitations) under which the United States waives sovereign immunity and agrees to be sued. *Block*, 461 U.S. at 287. That authority "applies alike to causes of action arising under acts of Congress and to those arising from some violation of rights conferred upon the citizen by the Constitution." *Lynch* v. *United States*, 292 U.S. 571, 582 (1934) (citation omitted); see *Block*, 461 U.S. at 291-292; *Schillinger* v. *United States*, 155 U.S. 163, 168 (1894). Neither the court of appeals nor respondents disputed that constitutional claims such as their purported Export Clause claim are subject to limitation. Indeed, although respondents asserted that they have paid the coal excise tax since its 1978 enactment, Pet. App. 36a, they are not seeking recovery of taxes paid before 1994, because even if their claims are treated as arising under the Constitution, they still must comply with the procedural limita-

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[7] Indeed, under the decision of the court of appeals, any allegedly unconstitutional tax would be a potential candidate for recognition of an "alternative" avenue of relief directly under the Constitution that would similarly evade the statutory prerequisites to refund suits. See, *e.g.*, U.S. Const. Art. I, § 8, Cl. 1, § 9, Cl. 4 (Uniformity and Direct Tax Clauses, both of which are framed in mandatory terms similar to the Export Clause); see also, *e.g.*, *Hernandez* v. *Commissioner*, 490 U.S. 680 (1989) (disallowance of federal tax deduction alleged to violate the Establishment and Free Exercise Clauses); *United States* v. *Hemme*, 476 U.S. 558 (1986) (federal tax alleged to violate the Due Process Clause). The Federal Circuit's loophole in the comprehensive tax remedial scheme crafted by Congress should not be allowed to remain open.

tions attached to the Tucker Act's conditional waiver of sovereign immunity, including its six-year "outside limit" for bringing suit, 28 U.S.C. 2501. See Pet. App. 9a, 14a; Resp. C.A. Reply/Response Br. 30. But just as the constitutional nature of their claim does not exempt them from the Tucker Act's limitation, it does not somehow strengthen their argument for applying the Tucker Act's general outside limit, rather than the specific limitations applicable to tax-refund claims.

The court of appeals therefore erred in failing to apply (or even to examine) the unambiguous terms of Sections 7422(a) and 6511(a). Because respondents are seeking to "maintain[]" a "suit * * * for the recovery of an[] internal revenue tax alleged to have been * * * illegally assessed," Section 7422(a) required them first to "duly file[] with the Secretary" a "claim for refund." Section 6511(a), in turn, required that their "claim" be filed within three years after the relevant tax return was filed. Respondents failed to meet those requirements, and their claims—however characterized—are therefore barred.[8]

C. Respondents Have No Cause Of Action Directly Under The Export Clause

The court of appeals appeared to deviate from the result compelled by the statutory text and this Court's cases based on its view that the Export Clause "affords

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[8] The logic of the position embraced by respondents and the court below would obviate the need for respondents to comply with the tax-refund scheme for *any* tax years, including the ones for which they sought and received a full refund. There is no justification for such needless litigation in the face of a clear congressional preference for exhausting the administrative refund procedures. And there is no justification for ignoring the other judgments of Congress in the specific tax-refund context, such as the statutes of limitations.

an independent cause of action for monetary remedies" against the United States. *Cyprus Amax*, 205 F.3d at 1373. That conclusion gets the matter backwards. A party cannot avoid the statutory procedures for obtaining relief for a constitutional violation by asserting that the underlying constitutional provision creates its own freestanding cause of action. To the contrary, the existence of the statutory remedy is a compelling reason not to infer a cause of action directly under the Constitution.[9]

Even beyond this basic conceptual difficulty, the court of appeals' Export Clause analysis was flawed. As this Court has repeatedly cautioned, a "freestanding damages remedy for a claimed constitutional violation * * * is not an automatic entitlement"; to the contrary, "in most instances" such a remedy is "unjustified." *Wilkie* v. *Robbins*, 127 S. Ct. 2588, 2597 (2007). No exception to that general rule is warranted here.

1. Nothing in the text of the Export Clause suggests that the Framers intended to create a constitutionally based private cause of action against the United States for money damages. Rather, the language of the provision is purely prohibitory: "No Tax or Duty shall be laid on Articles exported from any State." The preceding section of Article I grants Congress the power to "lay and collect Taxes," U.S. Const., Art. I, § 8, Cl. 1, and the Export Clause (like other provisions of Article I, Section 9) simply limits that power. Like the overwhelming majority of constitutional restrictions on the federal and state governments, the Export Clause does not specify

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[9] The logic of the court of appeals would suggest that a *Bivens* action should be inferred whenever a constitutional claim under 42 U.S.C. 1983 would be time-barred. Of course, the existence of 42 U.S.C. 1983 is one reason why the courts do not infer *Bivens* actions against state officials.

how, or whether, private plaintiffs may enforce the restriction.

The statutory tax-refund remedy undisputedly is a fully adequate means of enforcement. Taxpayers may raise their Export Clause challenges and receive monetary remedies (tax refunds and interest) if those challenges are sustained. The court of appeals nonetheless concluded that the "necessary implication" of the Export Clause—and any other constitutional provision that protects "pecuniary interests"—is that the Constitution creates its own "self-executing" money-damages remedy for any unconstitutional tax on exports. *Cyprus Amax*, 205 F.3d at 1373, 1374. That reasoning misreads both the Export Clause and this Court's Tucker Act cases.

a. The court of appeals suggested that this Court had endorsed a freestanding Export Clause cause of action in *United States* v. *United States Shoe Corp.*, 523 U.S. 360 (1998). That case is altogether inapposite. United States Shoe brought an action in the Court of International Trade, asserting that the federal Harbor Maintenance Tax (HMT) violated the Export Clause and seeking a refund. *Id.* at 365-366. But the usual prerequisites for tax-refund actions were expressly *in*applicable to the tax provisions at issue there. See 26 U.S.C. 4462(f)(3) (providing that the HMT "shall not be treated as a tax for purposes of subtitle F [which includes 26 U.S.C. 6511, 6532, and 7422] or any other provision of law relating to the administration and enforcement of internal revenue taxes"). Instead, the HMT was to be treated for jurisdictional purposes "as if such tax were a customs duty," 26 U.S.C. 4462(f)(2), and for that reason the Court of International Trade had exclusive jurisdiction over the case as one that "arises out of" a customs duty. *United States Shoe*, 523 U.S. at 365-366 (cit-

ing 28 U.S.C. 1581(i)(4)). Indeed, this Court noted that the challenge to the tax could *not* have been brought in the Court of Federal Claims under the Tucker Act, as respondents are seeking to do here. See *id.* at 366 n.3. This Court had no occasion to decide whether the Export Clause provides a cause of action for money damages, and it did not do so, contrary to the court of appeals' misreading. See *Cyprus Amax*, 205 F.3d at 1376. *United States Shoe* thus provides no support for the decision below.[10]

The court of appeals sought to bolster its misreading of *United States Shoe* by drawing a faulty analogy between the Export Clause and the Compensation Clause of Article III. The Federal Circuit had previously held that the Compensation Clause creates a monetary remedy for the salary wrongfully withheld from a life-tenured judge. See *Cyprus Amax*, 205 F.3d at 1374-1375 (citing *Hatter* v. *United States*, 953 F.2d 626, 627 (Fed.

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[10] Indeed, this Court did not examine the remedy that the lower courts had awarded. The sole question presented was whether the tax violated the Export Clause on the merits. See Pet. at i, *United States Shoe*, *supra* (No. 97-372). And the lower courts concluded that the cause of action to challenge the HMT arose either under the "federal statutes governing import transactions," *United States Shoe Corp.* v. *United States*, 19 Ct. Int'l Trade 1284, 1296 (1995), aff'd, 114 F.3d 1564 (Fed. Cir. 1997), aff'd, 523 U.S. 360 (1998), or under the statute permitting judicial review of a protest denied by the Customs Service, 28 U.S.C. 2631(a). See *Swisher Int'l, Inc.* v. *United States*, 205 F.3d 1358, 1364-1365, 1369 (Fed. Cir.), cert. denied, 531 U.S. 1036 (2000); see also *Stone Container Corp.* v. *United States*, 299 F.3d 1345, 1351 (Fed. Cir. 2000) (rejecting an attempt to sue for recovery of the HMT under the Tucker Act and thereby obtain a longer statute of limitations, because "neither the Supreme Court nor [the Federal Circuit]" nor "any other court" had "ever suggested that a suit for recovery of the HMT could be maintained under the Tucker Act with its six-year statute of limitations"), cert. denied, 532 U.S. 971 (2001).

Cir. 1992)). Nothing in *Hatter* suggests that if Congress fashioned a specific statutory scheme for remedying Compensation Clause claims, any freestanding cause of action would trump that scheme's procedural limits. But that is the basis of respondent's argument concerning the Export Clause.

In any event, the court of appeals vastly overstated the similarity between the two clauses. The court of appeals extended its *Hatter* holding to the Export Clause on the premise that the two constitutional provisions "employ similar language," in that they both "speak in absolute and unconditional terms, and both protect pecuniary interests." *Cyprus Amax*, 205 F.3d at 1375. But the court of appeals overlooked the most salient portion of the Compensation Clause, which had been central to the earlier decision in *Hatter*: the specific requirement that judges "shall * * * receive for their Services, a Compensation, which shall not be diminished." No such language requiring the payment of funds from the federal treasury appears in the Export Clause. Indeed, the Export Clause hardly resembles the Compensation Clause at all. The supposed textual similarities noted by the court of appeals in *Cyprus Amax* are plainly inadequate to justify reading the Export Clause to create a freestanding cause of action. Provisions throughout the Constitution—from Article I, Section 6, Clause 1, through the Twenty-Seventh Amendment—could be said to be worded in "unconditional terms" and to affect "pecuniary interests." The Federal Circuit's proposed rule would seemingly open the Court of Federal Claims to lawsuits for monetary relief brought against the United States under any one of those provisions. See note 7, *supra*. Such a reading of the Constitution is completely inconsistent with this

Court's admonition that "in most instances" there simply is no "freestanding damages remedy for a claimed constitutional violation." *Wilkie*, 127 S. Ct. at 2597; see also *Schillinger*, 155 U.S. at 168 (rejecting a sweeping argument for Tucker Act jurisdiction over constitutional tort claims that, if accepted, would be "equally good applied to every other provision of the Constitution").

b. The court of appeals also thought that applying a Tucker Act analysis to the Export Clause confirmed the existence of a freestanding money-damages remedy. See *Cyprus Amax*, 209 F.3d at 1373 (asserting that the proper analysis under the Tucker Act is whether the Export Clause is "fairly interpreted" as "money-mandating") (citing *James* v. *Caldera*, 159 F.3d 573, 580 (Fed. Cir. 1998)). This Court's Tucker Act cases do state that a federal *statute* or *regulation* creates a cause of action against the United States, within the scope of the Tucker Act's waiver of sovereign immunity, if "the source of substantive law can fairly be interpreted as mandating compensation by the Federal Government for the damages sustained." *United States* v. *Mitchell*, 463 U.S. 206, 218 (1983); accord, *e.g.*, *United States* v. *Navajo Nation*, 537 U.S. 488, 503-505 & n.10 (2003); *United States* v. *Testan*, 424 U.S. 392, 400 (1976). But that has nothing to do with the question here. The Export Clause might be enforceable by alternative means under the Tucker Act in the absence of the statutory tax-refund scheme. But there is no doubt that Export Clause claims can be remedied under the tax-refund scheme and no doubt that the latter statutory remedy is exclusive of any other Tucker Act claim.

Even more fundamentally, determining whether the Constitution creates a self-executing right of action requires quite a different analysis. Indeed, in *Testan* the

Court expressly distinguished the analysis of *statutory* rights of action against the United States from the cases examining suits for just compensation under the Fifth Amendment. 424 U.S. at 401 ("These Fifth Amendment cases are tied to the language, purpose, and self-executing aspects of that constitutional provision.").

In particular, here Congress has already created by statute a right to sue (subject to procedural limitations) to enforce the constitutional provision that respondents have invoked. The question is not whether respondents have a remedy for their allegations that the Export Clause has been violated; the question instead is whether the Constitution gives them a second, independent right of action that effectively overrides the procedural limitations that Congress has placed on the tax-refund remedy. The latter is not a difficult question.

2. When determining whether the Constitution provides plaintiffs with a right to sue, this Court has consistently respected a congressional decision not to subject the United States to suit, or to provide only a limited remedy. While this Court has occasionally discerned an implied cause of action directly under the Constitution, in the cases beginning with *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), the Court has adhered to two key limiting principles that, applied here, foreclose respondents' claims.

First, this Court has "consistently rejected invitations" to create constitutionally based implied rights of action when such remedies are not necessary to provide redress "against *individual officers*" for unconstitutional conduct that would otherwise not be remedied. *Correctional Servs. Corp.* v. *Malesko*, 534 U.S. 61, 70 (2001). Indeed, this Court has unanimously held that

Bivens-type liability will not lie against the United States itself, or any of its agencies, for several reasons. *FDIC* v. *Meyer*, 510 U.S. 471, 483-486 (1994). "[R]ecogniz[ing] a direct action for damages against federal agencies" risks "creating a potentially enormous financial burden for the Federal Government." *Id.* at 486. "[S]uch a significant expansion of Government liability" should be undertaken only by congressional act, not by judicial inference. *Ibid.* And such an expansion would in fact undermine the principal purpose of *Bivens* remedies—namely, to deter unconstitutional conduct by federal officers—by causing plaintiffs to focus their claims instead on the government, which has a reliably deeper pocket and which would not enjoy absolute or qualified immunity, as individual government officials do. See *id.* at 485.

Second, the federal courts have repeatedly declined to infer a new constitutionally based remedy when Congress has already given an opportunity for redress—even when that opportunity is less generous than the allegedly injured party would prefer. The whole point of the *Bivens* doctrine is to address the plight of those for whom "it is damages or nothing." *Davis* v. *Passman*, 442 U.S. 228, 245 (1979) (quoting *Bivens*, 403 U.S. at 410 (Harlan, J., concurring in the judgment)). Even during the days in which the Court was most receptive to *Bivens* claims it was not in the business of supplementing existing statutory means of recovery. Thus, in *Bush* v. *Lucas*, 462 U.S. 367 (1983), this Court declined to recognize an implied judicial remedy directly under the First Amendment for federal employees claiming retaliation, because Congress had created a comprehensive civil-service system through which federal employees could challenge adverse personnel actions. *Id.* at 385-390.

Although the Court assumed that the civil-service remedies were "not as effective as an individual damages remedy" under the Constitution, *id.* at 372, the relevant question was "whether an elaborate remedial system that has been constructed step by step, with careful attention to conflicting policy considerations, should be augmented by the creation of a new judicial remedy for the constitutional violation at issue." *Id.* at 388. The Court declined to tamper with Congress's chosen remedies in that fashion.

The Court reached a similar conclusion in *Schweiker* v. *Chilicky*, 487 U.S. 412 (1988), in which several Social Security disability claimants alleged that the termination of their benefits had violated the Due Process Clause and sought to sue the responsible federal officials for damages directly under that Clause. *Id.* at 417-418. Congress had provided them with only a limited remedy: a complex and "unusually protective" administrative process that could and did restore benefits wrongly denied (although it could not award damages for the wrongful denial). *Id.* at 424 (quoting *Heckler* v. *Day*, 467 U.S. 104, 106 (1984)). That framework, this Court held, was more than adequate to show that Congress did not intend to permit Social Security claimants to be able to sue for consequential damages. As in *Bush*, the Court therefore "declined * * * 'to create a new substantive legal liability . . . ' because [it was] convinced that Congress is in a better position to decide whether or not the public interest would be served by creating it." *Id.* at 426-427 (quoting *Bush*, 462 U.S. at 390).

Both of those principles confirm that the court of appeals was incorrect in recognizing a new cause of action against the United States, directly under the Export Clause. Respondents are not seeking to sue federal

officers to deter unconstitutional conduct; rather, they are seeking a monetary award from the Treasury under the heading of the Tucker Act. But the Tucker Act's waiver of sovereign immunity does not signal Congress's acquiescence in the creation of hitherto unrecognized implied rights of action under the Constitution that are separate and distinct from existing and adequate statutory remedies, in the tax context or otherwise. See *Meyer*, 510 U.S. at 484 (explaining that whether sovereign immunity has been waived is "analytically distinct" from whether a constitutionally based cause of action exists) (quoting *Mitchell*, 463 U.S. at 218). Indeed, in *Meyer* sovereign immunity had been waived, *id.* at 483, but the Court declined to infer a freestanding cause of action against the agency under the Due Process Clause.

Furthermore, the congressionally crafted refund procedure gives claimants in respondents' position a more-than-adequate opportunity to seek relief from any unconstitutionally imposed tax. Taxpayers have at least three years in which to seek a refund from the IRS; they may seek judicial review of any denial; and they may obtain interest on any refund awarded them.[11] Indeed, respondents have successfully used those remedies to obtain refunds for tax years 1997 through 1999. Although they failed to seek a refund with respect to the

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[11] Respondents, of course, are seeking "damages consisting of a refund." Pet. App. 37a-38a. But even if they had also sought consequential damages stemming from the imposition of the allegedly unconstitutional tax, that prayer for additional relief would make no difference to the analysis. In *Chilicky*, for example, the administrative tribunals could award claimants only their wrongly denied benefits; the Court nonetheless refused to give those claimants an additional, constitutionally based cause of action for consequential damages from the denial. See 487 U.S. at 427-428.

three previous tax years, and therefore cannot *now* obtain relief, that fact does not cast any doubt on the adequacy of the refund remedy.

3. This Court's cases considering constitutional challenges to state and local taxes underscore the inappropriateness of the damages remedy that the Federal Circuit has invented. Although this Court has on a number of occasions held that state or local taxes violate various provisions of the federal Constitution, the Court has expressly *declined* to hold that any of those constitutional provisions creates a freestanding federal cause of action for a refund. Rather, so long as States provide some form of meaningful relief—which may or may not entail a post-deprivation refund—the Constitution is satisfied. See, *e.g.*, *McKesson Corp.* v. *Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 40-41 (1990) (suggesting that States could comply with a judgment invalidating a discriminatory tax by giving a refund to the over-taxed, imposing a retroactive increase on the under-taxed, or some combination of the two); see also *Harper* v. *Virginia Dep't of Taxation*, 509 U.S. 86, 100-101 (1993) ("[F]ederal law does not necessarily entitle [taxpayers] to a refund."). "The State is free to choose which form of relief it will provide, so long as that relief satisfies the minimum federal requirements" of certainty and adequacy. *McKesson*, 496 U.S. at 51.

Here Congress has complied fully with its constitutional obligation by making available the refund procedure. See *Bob Jones Univ.* v. *Simon*, 416 U.S. 725, 746-747 (1974) (recognizing that the federal refund procedure is a constitutionally adequate remedy); *Anniston Mfg. Co.* v. *Davis*, 301 U.S. 337, 342 (1937). Nowhere did the court of appeals suggest (nor did respondents argue) that respondents could not or would not have obtained

complete relief had they filed a timely refund claim and then, if necessary, proceeded to court within the statutory time periods. Indeed, it is beyond dispute that there was no obstacle preventing respondents from proceeding in that fashion; the original challenge to the application of the coal excise tax to exported coal was initiated by seven coal companies who, before bringing suit, first filed timely refund claims for the single tax quarter at issue. *Ranger Fuel Corp.* v. *United States*, 33 F. Supp. 2d 466, 467-468 (E.D. Va. 1998).

Moreover, in each of its cases examining the adequacy of refund procedures, this Court has taken pains to emphasize that taxing authorities have an entirely legitimate interest in minimizing disruptions to the government's collection and use of its revenue. Thus, to address the valid "concern that [the] obligation to provide refunds for what later turns out to be an unconstitutional tax would undermine the * * * ability to engage in sound fiscal planning," taxing authorities have considerable "freedom to impose various procedural requirements on actions for postdeprivation relief." *McKesson*, 496 U.S. at 44-45. For instance, they may condition post-deprivation relief on "paying under protest or providing some other timely notice of complaint," and they may "enforce relatively short statutes of limitations applicable to such actions." *Id.* at 45. Those are precisely the requirements that Congress has put in place here—requirements that respondents seek to circumvent by suing directly under the Export Clause without regard to the limits imposed by Congress on the tax-refund remedy.

D. The Court of Appeals Compounded Its Earlier Error By Granting Respondents Interest Under The Very Statutory Scheme It Had Previously Held Inapplicable

The Federal Circuit's award of interest to respondents compounded its error. Respondents claimed that they were not proceeding under the tax-refund statute, in order to evade the administrative claim requirement and the three-year statute of limitations, but they simultaneously asserted that they were entitled to interest under a statute applicable only to tax refunds. Such an attempt to pick and choose among the elements of Congress's comprehensive remedial mechanism is precisely what this Court condemned in *Hinck*, and the court of appeals erred by allowing respondents "to isolate one feature of th[e] 'precisely drawn, detailed'" tax-refund remedial scheme that they liked—the allowance of interest—without requiring them to comply with the limitations of that same scheme. *Hinck*, 127 S. Ct. at 2016 (quoting *EC Term of Years*, 127 S. Ct. at 1767). "Congress plainly envisioned [the remedy] as a package deal," *ibid.*, but in this case the court of appeals improperly untied the package and discarded most of its contents.

1. "[I]nterest cannot be recovered in a suit against the Government in the absence of an express waiver of sovereign immunity from an award of interest." *Library of Cong.* v. *Shaw*, 478 U.S. 310, 311 (1986). That "traditional legal rule regarding the immunity of the United States from interest" (*id.* at 317) is codified in the Judicial Code, which specifies that "[i]nterest on a claim against the United States shall be allowed in a judgment of the United States Court of Federal Claims only under a contract or Act of Congress expressly providing for

payment thereof." 28 U.S.C. 2516(a). And when a plaintiff claims that a statute *does* waive the government's immunity from interest, the courts scrutinize that assertion with "an added gloss of strictness," even more so than other limited waivers of sovereign immunity. *Shaw*, 478 U.S. at 318. Without clear and express statutory authorization, the Court of Federal Claims simply cannot award interest.

The court of appeals therefore erred in relying on "general damages principles," Pet. App. 1a, and in appealing to the diffuse notion that "the government should pay for its use of a taxpayer's money," *id.* at 5a, as justifications for its award of interest. Those generalities do not satisfy the requirements for demonstrating an interest-specific waiver of sovereign immunity. Nor was it appropriate for the court of appeals to turn to the legislative history of Section 2411, see Pet. App. 5a-6a (discussing H.R. Rep. No. 179, 68th Cong., 1st Sess. 35 (1924)). If the requisite "clarity does not exist [in Section 2411], it cannot be supplied by a committee report." *Nordic Vill.*, 503 U.S. at 37 (explaining that "the 'unequivocal expression' of elimination of sovereign immunity that we insist upon is an expression in statutory text").

2. The court of appeals' basis for finding interest authorized, but the administrative-claim requirement excused, was internally inconsistent, as can be seen from the face of the operative statutes. The court of appeals reasoned that the judgment in respondents' favor was a "judgment * * * rendered * * * for any overpayment in respect of any internal-revenue tax," making an award of interest appropriate. Pet. App. 4a (quoting 28 U.S.C. 2411). But in reaffirming *Cyprus Amax* as controlling, the court simultaneously held that respondents

were not required to file administrative claims because this case was *not* a "suit or proceeding * * * for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed," 26 U.S.C. 7422(a). There simply is no meaningful distinction in this context between a suit for an "overpayment in respect of any internal-revenue tax" and a suit "for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed."

Indeed, Section 6511(a), which sets out the time limits for Section 7422(a)'s administrative-claim requirement, refers to a "[c]laim for credit or refund of an *overpayment* of any tax imposed by this title." 26 U.S.C. 6511(a) (emphasis added). Construing Section 6511, this Court indicated that the term "overpayment" of tax is essentially synonymous with Section 7422(a)'s reference to erroneously, illegally, or wrongfully collected taxes:

> Section 6511(a) applies to claims for refund of a tax "overpayment." The commonsense interpretation is that a tax is overpaid when a taxpayer pays more than is owed, for whatever reason or no reason at all. * * * The word encompasses "erroneously," "illegally," or "wrongfully" collected taxes, as those terms are used in * * * § 7422(a).

Dalm, 494 U.S. at 609 n.6. The court of appeals improperly departed from this Court's construction of the relevant statutory terms—and defied common sense—by holding, in effect, that a claim for recovery of an "overpayment" of an unconstitutionally collected tax is not a claim for recovery of an "erroneously," "illegally," or "wrongfully" collected tax.

The court of appeals' decision on the interest question further exacerbated the problems created by *Cy-*

prus Amax. The interest statute is an integral part of the framework for processing tax-refund claims, both administratively and in court.[12] When a taxpayer seeks to recover unconstitutionally imposed taxes, with interest thereon, he must proceed under that single framework in all respects, including the exhaustion and timing requirements. The court of appeals erred in authorizing selective departure from the remedial scheme established by Congress.

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[12] The closeness of the relationship can be seen from the original wording of the interest provision and the administrative-claim provision. When the provision now codified at Section 2411 was amended in 1921, it provided that interest was allowed in a judgment for "any internal-revenue tax erroneously or illegally assessed or collected." Revenue Act of 1921, ch. 136, § 1324(b), 42 Stat. 316. Those are the same key words that appeared in Section 7422(a), the administrative-exhaustion provision, at the time (and still appear there today). Although Section 2411 was amended a few years later (in 1928) to substitute the shorter phrase "any overpayment," see Revenue Act of 1928, ch. 852, §§ 614-615, 45 Stat. 876-877, "[t]he legislative history * * * appears to attribute no significance whatsoever to this shift in language." *Usibelli Coal Mine* v. *United States*, 54 Fed. Cl. 373, 383 & n.22 (2002) (citing H.R. Rep. No. 2, 70th Cong., 1st Sess. 35 (1927); S. Rep. No. 960, 70th Cong., 1st Sess. 43 (1928)), appeal docketed, Fed. Cir. No. 06-5068. The parallel statutory language is strong evidence that Congress intended interest and administrative exhaustion to form components of the same refund-remedy package.

CONCLUSION

The judgment of the court of appeals should be reversed, and the case remanded to be dismissed for lack of jurisdiction.

Respectfully submitted.

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APPENDIX

1. Article 1, Section 9, Clause 5 of the United States Constitution (the Export Clause) provides:

No Tax or Duty shall be laid on Articles exported from any State.

2. Section 6511 of Title 26 of the United States Code provides, in relevant part:

Limitations on credit or refund

(a) Period of limitation on filing claim

Claim for credit or refund of an overpayment of any tax imposed by this title in respect of which tax the taxpayer is required to file a return shall be filed by the taxpayer within 3 years from the time the return was filed or 2 years from the time the tax was paid, whichever of such periods expires the later, or if no return was filed by the taxpayer, within 2 years from the time the tax was paid. Claim for credit or refund of an overpayment of any tax imposed by this title which is required to be paid by means of a stamp shall be filed by the taxpayer within 3 years from the time the tax was paid.

(b) Limitation on allowance of credits and refunds

(1) Filing of claim within prescribed period

No credit or refund shall be allowed or made after the expiration of the period of limitation prescribed in subsection (a) for the filing of a claim for credit or refund, unless a claim for credit or refund is filed by the taxpayer within such period.

* * * * *

3. Section 6532 of Title 26 of the United States Code provides, in relevant part:

Periods of limitation on suits

(a) Suits by taxpayers for refund

(1) General rule

No suit or proceeding under section 7422(a) for the recovery of any internal revenue tax, penalty, or other sum, shall be begun before the expiration of 6 months from the date of filing the claim required under such section unless the Secretary renders a decision thereon within that time, nor after the expiration of 2 years from the date of mailing by certified mail or registered mail by the Secretary to the taxpayer of a notice of the disallowance of the part of the claim to which the suit or proceeding relates.

(2) Extension of time

The 2-year period prescribed in paragraph (1) shall be extended for such period as may be agreed upon in writing between the taxpayer and the Secretary.

* * * * *

4. Section 7422 of Title 26 of the United States Code provides, in relevant part:

Civil actions for refund

(a) No suit prior to filing claim for refund

No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been col-

lected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Secretary, according to the provisions of law in that regard, and the regulations of the Secretary established in pursuance thereof.

* * * * *

5. Section 1346 of Title 28 of the United States Code provides, in relevant part:

United States as defendant

(a) The district courts shall have original jurisdiction, concurrent with the United States Court of Federal Claims, of:

(1) Any civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws;

* * * * *

6. Section 1491 of Title 28 of the United States Code provides, in relevant part:

Claims against United States generally; actions involving Tennessee Valley Authority

(a)(1) The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation

of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. * * *

* * * * *

7. Section 2411 of Title 28 of the United States Code provides:

Interest

In any judgment of any court rendered (whether against the United States, a collector or deputy collector of internal revenue, a former collector or deputy collector, or the personal representative in case of death) for any overpayment in respect of any internal-revenue tax, interest shall be allowed at the overpayment rate established under section 6621 of the Internal Revenue Code of 1986 upon the amount of the overpayment, from the date of the payment or collection thereof to a date preceding the date of the refund check by not more than thirty days, such date to be determined by the Commissioner of Internal Revenue. The Commissioner is authorized to tender by check payment of any such judgment, with interest as herein provided, at any time after such judgment becomes final, whether or not a claim for such payment has been duly filed, and such tender shall stop the running of interest, whether or not such refund check is accepted by the judgment creditor.

8. Section 2501 of Title 28 of the United States Code provides, in relevant part:

Time for filing suit

Every claim of which the United States Court of Federal Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues.

* * * * *